Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

BRIAN DALMER,

Petitioner,

v.

LAMOILLE FAMILY CENTER and DAVID CONNOR,

Respondents.

On Petition For A Writ Of Certiorari To The Vermont Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is a father's clearly-established constitutional liberty interest to family integrity violated by the Vermont Supreme Court's refusal to recognize such a well-established right?

II. Did the Court err in granting defendants' summary judgment on plaintiff's civil rights claim for violating his fundamental right to family integrity?

LIST OF PARTIES

The full name of Petitioner and Plaintiff in this case is:

Brian Dalmer

The full names of Respondents and Defendants in this case are:

Lamoille Family Center and
David Connor

The full name of the Amicus Curiae and a former Defendant is:

Vermont Department of Social and Rehabilitative Services

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PETITION FOR WRIT OF CERIORARI

Brian Dalmer petitions the United States Supreme Court for a Writ of Certiorari to review the decision of the Supreme Court of the State of Vermont dated August 15, 2002.

OPINIONS BELOW

The opinions below are not yet officially reported and are in Appendix A. The Vermont Supreme Court's decision *Dalmer v. State of Vermont, et al.*, is reported at 13 Vermont Law Week at Page 201. The case caption should really be *Dalmer v. Lamoille Family Center, et al.*

STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari is taken from the decision of the Vermont Supreme Court dated August 15, 2002 affirming the summary judgment of the Lamoille Superior Court of Vermont which granted respondents' motion for summary judgment. The jurisdiction of this Court is invoked under 28 U.S.C. §2104.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides that:

. . . ; nor shall any State deprive any person of life liberty, or property, without due process of law; . . . .

2. 42 U.S.C. §1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . . "

STATEMENT OF THE CASE

On December 26, 1993, Jeremy Dalmer, who was 15 years old, left home, because he had an argument with his father over snowboarding and house rules. The next day, unbeknownst to his parents and without their permission, he rode his bike from Morrisville, Vermont to the Plainfield/Marshfield area and found shelter at a friend's home. On or about December 27, 1993, his friend's mother called the Washington County Youth Services to ask what she should do about Jeremy. They gave her the phone number of the Department of Social and Rehabilitation Services for the State of Vermont (hereinafter "SRS") and told her that Jeremy should contact this agency.

On December 28, 1993, Jeremy contacted the Morrisville office of SRS to notify them that he had run away from home. SRS contacted David Connor at Lamoille Family Center ("LFC") to involve Jeremy with their

shelter program. Connor was the director of a program called Lamoille Inter-agency Network for Kids ("LINK"). LFC had a contract with SRS to provide services to unmanageable youths and runaways, as an independent contractor.

On December 29, 1993, Connor took over the care and custody of Jeremy at the request of SRS. On December 29, 1993, Connor informed plaintiff his son had been found. Connor told plaintiff that Jeremy was in his care and custody, but would not tell him where Jeremy was staying. Plaintiff asked Connor to return Jeremy to him and never gave permission to Connor to shelter Jeremy.

While Connor knew that plaintiff had legal custody of Jeremy, he considered the shelter program to be involuntary on the parent's part. Connor informed the plaintiff that Connor had legal custody of Jeremy and it would do plaintiff no good to call the police. Connor suggested that plaintiff should negotiate with Jeremy over compromising his house rules in order to have Jeremy return home.

The LFC shelter program placed Jeremy with two different shelter homes. Connor took it upon himself to drive Jeremy back and forth to school in Morrisville, which was 30 miles from where he was living. During these drives, Connor and Jeremy had conversations about Jeremy's complaints about home. Jeremy's wish to deviate from his parents' rules was reinforced by Connor's suggestion that the house rules could be negotiated.

On January 6, 1994, the defendants placed Jeremy in a shelter home in Morrisville. From January 6, 1994 until January 20, 1994, Jeremy stayed there as part of the LFC's LINK program, against plaintiff's wishes, and despite his continuing demands to return Jeremy home.

While at the shelter home, Jeremy was allowed to do things he would not have been allowed to do at home, such as watch television and stay out late, despite plaintiff's protests.

On January 20, 1994, Connor told Jeremy that the two-week period during which he could keep him in a shelter home under the LINK contract with SRS had expired. Jeremy was told he had the following options: " . . . to go home; to call his family and work out some agreement with them, . . . to turn himself into the police . . . and that if he didn't do either of those three, he would be considered a runaway and would be picked up by the police."

On January 20, 1994, Jeremy just walked out of the shelter home and decided not to exercise any of the options that Connor had given him. Defendants had no idea where Jeremy was going. Jeremy had simply been left to make his own decision, and returned to his friend's residence in Marshfield.

On learning that Jeremy had left the shelter home, plaintiff became desperate and called the police. On January 21, 1994, the police picked up Jeremy in Marshfield, and returned him home. The next day he ran away again. The first runaway led to the second and other runaways. However, Jeremy testified he would not have repeatedly run away again and again had he been immediately returned home by defendants on his first runaway. As a result of defendants' wrongful conduct, plaintiff lost his right to the custody and care of Jeremy and the right to Jeremy's services as a minor and suffered extreme emotional distress.

On February 24, 1995, plaintiff instituted suit in the Lamoille County Superior Court against defendants LFC and Connor, as well as SRS. Plaintiff maintained that defendants unlawfully took custody of Jeremy and deprived him of his fundamental liberty interest to family integrity. Plaintiff requested trial by jury and sought damages for defendants' interference with his custody of Jeremy, which led to a temporary loss of companionship and multiple runaways. SRS, LFC, and Connor moved for summary judgment to dismiss plaintiff's civil rights claim.

Superior Court Judge John Meaker, in an Opinion and Order dated August 15, 1997, dismissed the 42 U.S.C. §1983 civil rights claim against all defendants, finding that none of plaintiff's constitutional rights were violated by defendants, since there was no constitutional right to family integrity. (App. 26 and 27). On appeal, the Vermont Supreme Court affirmed Judge Meaker's decision concluding that there is no established constitutional right to family integrity. (App. 22).

REASONS FOR GRANTING CERTIORARI

Plaintiff brings this Petition for Writ of Certiorari from the Vermont Supreme Court's August 15, 2002 Decision affirming the Lamoille Superior Court's Order, which granted defendants' motion for summary judgment against plaintiff on his civil rights claim. Plaintiff claimed defendants had interfered with his constitutional right to family integrity by taking custody of his 15-year-old son without his permission or a court order. The Superior Court found as a matter of law that defendants did not violate plaintiff's civil rights as a parent. The Vermont

Supreme Court affirmed the decision concluding that there is no constitutional right to family integrity. On appeal, the Vermont Supreme Court has apparently ignored the Second Circuit Court of Appeal's decisions that parents do have a constitutional right to family integrity and by doing so has rejected established law.

ARGUMENT

The Vermont Supreme Court Erred In Refusing to Recognize Plaintiff's Constitutional Right to Family Integrity.

The freedom of children and parents to relate to one another in the context of the family, free of governmental interference, is a basic liberty long established in our constitutional law. Parents have a fundamental constitutionally protected liberty interest in the care, custody, and management of their children in the Second Circuit. *Wilkinson v. Russell*, 182 F.3d 89, 103 (2nd Cir. 1999).

In the present case, plaintiff demonstrated that he had been deprived of a constitutionally protected right and that the defendants acted under color of state law in violation of 42 U.S.C. §1983. *See, e.g., Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 930 (1982). Because of the "color of state law" requirement, plaintiffs ordinarily may only bring civil rights claims against individuals engaged in governmental action. *See, e.g., United States v. Jacobsen,* 466 U.S. 109, 113 (1984). However, under certain circumstances, such as here, private actions may be deemed to be actions taken under color of state law. *See, Rendell-Baker v. Kohn,* 457 U.S. 830, 838 (1982). *Blum v. Yaretsky,* 457 U.S. 991, 1004 (1982).

Here, the plaintiff on summary judgment had presented facts demonstrating a sufficient nexus or joint activity between LFC and SRS given their contractual undertaking for LFC to run the LINKS shelter program for SRS. Plaintiff also showed that he was the legal custodian and natural parent of Jeremy, and that defendants had unlawfully taken custody or interfered with his custody of Jeremy without his consent with no legal basis to do so.

The Lamoille Superior Court stated in its opinion that " . . . the Vermont Supreme Court's decision in *Billado, et al. v. Appel, et al.,* is controlling . . . any claim by the plaintiffs that their broad theories of constitutional rights . . . were violated would also fail under the reasoning in *Billado.*" (App. 26). The Vermont Supreme Court agreed with the Superior Court and stated in its Decision that plaintiff's " . . . substantive claim is indistinguishable from that made in *Billado.* We decline plaintiffs' invitation to overrule *Billado.*" (App. 22).

In the *Billado v. Appel,* 165 Vt. 482 (1996) case at page 489, the Vermont Supreme Court had stated:

> there is no controlling constitutional right of family integrity or because the right is so amorphous and conditional that no worker could know that his or her actions were in violation of the right.

Even though the Second Circuit Court of Appeal has specifically questioned this conclusion, in the case of *Wilkinson v. Russell,* 182 F.3d 89, 104, n.8 (2nd Cir. 1999) the Vermont Supreme Court has persisted in the present case in denying that there is a constitutional right

to family integrity. In footnote 8 at page 104 of the *Wilkinson, supra,* decision the Second Circuit Court of Appeals stated as follows:

> Moreover, to whatever extent the *Billado* court intended to go further and to call into doubt the very existence of a constitutional right to family integrity, we simply cannot agree. Despite a smattering of contrary decisions, overwhelming authority has long confirmed that such a right exists.

However, despite the Second Circuit's prior conclusion that there is a constitutional right to family integrity, here the Vermont Supreme Court has persisted in not recognizing the well-established right. The Vermont Supreme Court clearly erred as a matter of law in affirming the Superior Court's decision finding that there is no federal constitutional right to family integrity.

CONCLUSION

The decision of the Vermont Supreme Court should be reversed and the case should be remanded for a jury trial on Plaintiff's civil rights claim.

Dated at Stowe, Vermont, this 5th day of November, 2002.

Respectfully submitted,

HAROLD B. STEVENS, ESQUIRE
Counsel of record for Petitioner

ENTRY ORDER

SUPREME COURT DOCKET NO. 1999-479

NOVEMBER TERM, 2000

Brian Dalmer, et al.	)	APPEALED FROM:
	)	
v.	)	Lamoille Superior Court
State of Vermont, et al.	)	DOCKET NO.
	)	45-2-95 Lecv
	)	(Filed Aug. 15, 2002)

In the above-entitled cause, the Clerk will enter:

Affirmed.

FOR THE COURT:

/s/ John A. Dooley
John A. Dooley,
Associate Justice

Concurring:

/s/ James L. Morse
James L. Morse,
Associate Justice

/s/ Denise R. Johnson
Denise R. Johnson,
Associate Justice

/s/ Marilyn S. Skoglund
Marilyn S. Skoglund,
Associate Justice

/s/ Brian L. Burgess
Brian L. Burgess,
District Judge
Specially Assigned

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions, Vermont Supreme Court, 109 State Street, Montpelier, Vermont 05609-0801 of any errors in order that corrections may be made before this opinion goes to press.

No. 1999-479

Brian Dalmer, et al.	Supreme Court
v.	On Appeal from Lamoille Superior Court
State of Vermont, et al.	November Term, 2000

Alden T. Bryan, J.

Harold B. Stevens, Stowe, for Plaintiff-Appellant.

Philip C. Woodward and Afi Ahmadi of Dinse, Knapp & McAndrew, P.C., Burlington, for Defendants-Appellees.

William H. Sorrell, Attorney General, and James C. Shea and Michael O. Duane, Assistant Attorneys General, Montpelier, for Amicus Curiae Department of Social and Rehabilitation Services.

PRESENT: Dooley, Morse, Johnson and Skoglund, JJ., and Burgess, D.J., Specially Assigned

(Filed Aug. 15, 2002)

DOOLEY, J. In December 1993, Jeremy Dalmer ran away from home for the first of five separate times during the ensuing two years. This act is at the center of this litigation. In December 1995, Brian Dalmer and his wife Colleen Dalmer, parents of Jeremy, filed this lawsuit

against defendants, the Vermont Department of Social and Rehabilitative Services (SRS), Gerald Jeffords (a SRS employee), the Lamoille Family Center (LFC) and David Connor (an LFC employee), alleging: defendants negligently took and retained custody of Jeremy in violation of the Juvenile Proceedings Act, 33 V.S.A. §§ 5501-5561; defendants deprived plaintiffs of their fundamental liberty interest in family integrity in violation of their civil rights, 42 U.S.C. § 1983; SRS maliciously brought an action to terminate plaintiffs' parental rights; defendants negligently placed Jeremy in foster homes where he was neglected and did not receive proper care, food or supervision; and defendants intentionally inflicted emotion distress on plaintiffs. The trial court granted summary judgment to defendants on the civil rights claim. After testimony in a jury trial concluded, the trial court granted judgment as a matter of law on the remaining claims. Appellants then dismissed all claims against Gerald Jeffords and SRS, leaving only those against Connor and LFC. Father appeals both the summary judgment and the judgment as a matter of law as to these defendants. We affirm.

The material facts in this case are not in dispute. On December 26, 1993, Jeremy Dalmer, who was fifteen years old at the time, had an argument with his father over some house rules, including ones relating to curfews, television viewing, snowboarding, and other issues about Jeremy's lifestyle. That night, Jeremy ran away from home. He traveled thirty-five miles by bicycle through the cold snow to a motel in Morrisville, where he stayed the night. The next day he rode his bicycle to a nearby friend's house. That day, December 27, his friend's mother contacted Washington County Youth Services, which advised

her to contact SRS. She told Jeremy that she was uncomfortable with him staying at her house without his parents' permission, so he left her residence and went to the Fisk residence.

The next day, Jeremy contacted the Morrisville SRS office himself to inform them that he ran away from home. SRS referred Jeremy's case to the LFC and David Connor. LFC had a contract with SRS to run the LINK program (the Lamoille Inter-agency Network for Kids) to provide shelter and other services to unmanageable youths and runaways in the area. LINK is a program "to assist children who have run away for the purpose of reuniting them with their parents, guardian or legal custodian." 33 V.S.A. § 5511(3). Connor was the director of this program. Prior to this, Connor had no contact with Jeremy. On December 29, Connor contacted Jeremy's mother and father and told them that their son had run away from home. Connor obtained a history of Jeremy's problems from his father, who demanded that Connor return Jeremy to his parents' home. Connor refused to force Jeremy to go home because Jeremy had made it clear that, if forced to return home, he would run away again. Connor did attempt to negotiate Jeremy's return to his home, rather than calling the police to have them take Jeremy into their custody as a runaway. Father rejected Connor's attempts at reconciling the parties and continued to demand that the LFC and SRS return Jeremy to his home.

While Jeremy was staying at the Fisk residence, Connor drove him thirty miles to school each day. During the daily drives he encouraged Jeremy to return home; he also told Jeremy that he had legal options other than going home, including turning himself over to SRS custody. Despite Connor's encouragement to return home,

Jeremy chose to remain with the Fisks. On January 6, 1994, at Jeremy's request, Jeremy entered the LINK shelter program and began to stay with the Stone family. At the Stone residence, Jeremy was allowed to watch television and stay out later than his parents had allowed him to when he was living at home. While Jeremy was staying with the Stones, Connor continued to encourage Jeremy to go back to his family. Jeremy also spoke with his family a number of times on the telephone and returned home to eat several meals with them.

On January 20, 1994, Connor informed Jeremy that he could no longer take advantage of the LINK program because LINK's contract with SRS allowed for only a two-week stay at a shelter. He gave Jeremy three options: go home to his family, call his family to work out an agreement with them, or turn himself in to the police. He told Jeremy that if he did not choose one of these three options, he would be considered a runaway child and the police would detain him. That same day, Connor also informed father that the LFC's contract had ended. Jeremy did not exercise any of the three options Connor had given him. Instead, he went to the Fisk residence again, but later that night a state trooper picked Jeremy up and first took him to the State police barracks in Waterbury and then back home to his parents.

The next morning, as he promised, Jeremy ran away again; this time he took a taxi to the Morrisville police station and turned himself in as a runaway. He ran away from home again in May 1994 and a fourth time in November 1994. Finally, he ran away a fifth time in May 1995 over a dispute about his prom. After several termination-of-parental-rights hearings, the family court issued an order placing Jeremy in the legal custody of his parents

and giving SRS protective supervision. Throughout the hearings, Jeremy testified that if the court ordered him to go home, he would run away again.

In December 1995, Plaintiffs Brian and Colleen Dalmer sued defendants SRS, Gerald Jeffords, the LFC, and David Connor, listing the five causes of action set out at the beginning of this opinion. The trial court granted summary judgment for defendants on the civil rights and malicious prosecution claims. After hearing plaintiffs' evidence, the court granted defendants judgment as a matter of law on the remaining claims. Following the final judgment, plaintiffs dismissed all claims against SRS and Gerald Jeffords, leaving only the claims against the LFC and David Connor for our review. They have raised issues with respect to each of the counts except the malicious prosecution count.

Our understanding of the issues on appeal is somewhat affected by the confusing series of amendments, or attempted sets of amendments, to the complaint that added and dropped parties and significantly modified the central issues in the case. On the eve of trial, plaintiffs attempted to amend their complaint to modify the first and fourth causes of action. Significantly, that proposed amendment also appeared to change the parties, identifying the plaintiffs only as "Brian Dalmer and Jeremy Dalmer."

The most important amendment changed the first count from one that alleged a violation of the Juvenile Procedures Act to one that alleged that defendants were negligent or grossly negligent by taking and keeping custody of Jeremy in violation of the Juvenile Procedures Act. Plaintiff called this a "negligence per se" count.

Although this amendment was never formally authorized, the court and parties proceeded as if it had occurred. See V.R.C.P. 15(b).

Plaintiffs also attempted to amend the fourth count, which alleged defendants were negligent in placing and supervising Jeremy in certain foster homes. This amendment was never formally authorized. None of plaintiffs' arguments on appeal appear to relate to this count. We therefore need not determine whether the amendment occurred.

Plaintiffs' first two appeal issues relate to the trial court's resolution of their negligence claim. As discussed above, we address these issues in relation to the first amended count. In practical terms, this means we are addressing the actions of defendants only up to and including January, 1994 – that is, only with respect to the first time Jeremy ran away from home. Although the proper parties were never clearly resolved, we will assume that by the time of trial the plaintiffs were Brian and Jeremy Dalmer. With that background in mind the first two issues ar [sic]: (1) whether the court erred in concluding that "plaintiffs did not have a presumed negligence claim against defendants for violation" of 33 V.S.A. § 5512(c); and (2) the court erred in holding that a jury could not find that defendants were negligent and that there was no proximate cause.

The logical progression of plaintiffs' first argument is as follows: defendants violated 33 V.S.A. §§ 5511, 5512(c) by failing to return Jeremy to his father after 7 days; §§ 5511 & 5512(c) are safety statutes so violation is negligence per se; the court erred in failing to submit plaintiffs'

negligence per se case to the jury. We cannot accept any of the steps of this argument.

The statutory sections on which plaintiffs rely deal generally with the taking of juveniles into custody, normally prior to the formal commencement of juvenile proceedings. Title 33, section 5510 specifies four methods by which a juvenile may be taken into custody: (1) by arrest; (2) by order of the juvenile court; (3) by a law enforcement officer who has reasonable grounds to believe that a "child is in immediate danger from his surroundings;" and (4) by a law enforcement officer who has reasonable grounds to believe that the child "has run away from his parents, guardian or legal custodian."[1] The person who takes custody of a child has three options: (1) to release the child to the child's parents, guardian or custodian; (2) to deliver the child to the juvenile court; and (3) in case of a runaway child, a law enforcement officer can deliver the child to an organization designated by SRS "as qualified to assist children who have run away for the purpose of reuniting them with their parents, guardian or legal custodian." *Id.* § 5511(3). Under § 5512(a), SRS "shall designate shelters throughout the state where a child taken into custody pursuant to section 5510(4) of this title may be housed for a period not to exceed 7 days." When a child is delivered to a designated shelter program, the program director or designee must notify the parents, guardian or custodian "that the child has been taken into custody," *id.* § 5512(b)(1), and attempt "to mediate the

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[1] Sections 5510 and 5511 were amended after the trial of this case. See 2001, No. 41, §§ 5, 6. The amendments have no bearing on the issues before us.

differences between the parties," *id.* § 5512(b)(2). During the time that the child is in the shelter, legal custody of the child remains with the parent unless the juvenile court otherwise orders. *Id.* § 5512(d). Upon the expiration of the 7 day period set out in § 5512(a) or at the request of the child or parents, the child must be released to the child's parents, guardian or custodian or a law enforcement officer who must deliver the child to the juvenile court pursuant to § 5511(2). *Id.* § 5512(c).

Plaintiffs allege that defendants took Jeremy into custody and failed to deliver him to his parents as required by § 5512(c). Alternatively, they allege that defendants were required by § 5511 to deliver Jeremy to his parents or the juvenile court.

As the superior court held, plaintiffs' arguments fit neither the facts nor the law. Plaintiffs particularly rely upon § 5512(a) which authorizes that children taken into custody under § 5510(4) be housed for no-more than 7 days and argues that defendants held Jeremy over 7 days.[2] By its terms, however, the limit applies only to children taken into custody under § 5510(4) – that is, by a law enforcement officer. No law enforcement officer was involved in this case during the period covered by plaintiffs' argument. If Jeremy was held in physical custody, it was not by a law enforcement officer.

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[2] The 7-day limit of § 5512(a) is largely irrelevant to this case because § 5512(c)(1) requires the shelter to return the child to the child's parents when the parents request such return. It is undisputed that Jeremy's father consistently sought the return of Jeremy from the first contact by Connor.

We emphasize that the absence of the involvement of a law enforcement officer is not a technicality in this context. Under § 5510, the Legislature limited the persons who could take custody of a child without a court order. If defendants took custody of Jeremy, as plaintiffs allege, they did so unlawfully. Cf. *State v. Sullins,* 509 N.W.2d 483, 484-85 (Iowa 1993) (where statute provides that peace officer may take protective custody of a child, juvenile court officer was not a peace officer and had no authority to take such protective custody).

More broadly, we agree with defendants that they did not hold Jeremy in custody as a matter of law. We are reviewing a judgment as a matter of law, and in such circumstances, we employ the same standard as the trial court. See *Gero v. J.W.J. Realty,* 171 Vt. 57, 59, 757 A.2d 475, 476 (2000).[3] Judgment as a matter of law may be granted where " 'there is no legally sufficient evidentiary basis for a reasonable jury to find for [the nonmoving] party.' " *Brueckner v. Norwich University,* 169 Vt. 118, 122, 730 A.2d 1086, 1090 (1999) (quoting V.R.C.P. 50(a)(1), (b)) (alteration in original). Under the rule, we must consider the evidence in the light most favorable to the nonmoving party, excluding the effect of any modifying evidence. See *id.*

The Juvenile Procedures Act does not define "custody," but it does define "legal custody" as the legal status

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[3] Plaintiffs argue that the superior court found that a jury question existed on whether defendants took physical custody of Jeremy, and we are bound by this ruling. We disagree. Because the standard of review of a judgment as a matter of law is the same as that employed by the trial court, our review is nondeferential.

created by order of the juvenile court which invests in a party "the right to have the physical possession of a minor and to determine where and with whom he shall live, the authority to consent to major medical, psychiatric, and surgical treatment, and the right and duty to protect, train, and discipline him and to provide him with food, shelter, education and ordinary medical care." 33 V.S.A. § 5502(a)(10). We recognize that with respect to a runaway child in a shelter, the status plaintiffs argue Jeremy was in, the parents retain "legal custody." *Id.* § 5512(d). Reading the sections together, we believe the intent is that the custodian under §§ 5510, 5511, and 5512, has only physical custody, that is, the physical possession of the child. In other contexts, physical custody is defined in terms of possession or restrictions on liberty. See 15 V.S.A. § 1031(8) (under Uniform Child Custody Jurisdiction Act, physical custody means "actual possession and control"); *State v. Wargo,* 168 Vt. 231, 234, 719 A.2d 407, 409 (1998) (for purposes of post-conviction relief statute and V.R.Cr.P. 32(d), custody means a significant restraint of personal liberty).

There was no evidence that LFC or Connor had physical possession of Jeremy or imposed restrictions on his liberty. Originally, Jeremy lived in the home of his choice. Thereafter, for two weeks, LFC allowed him to live in the shelter home of the Stones which enabled Jeremy to go to his home school. Although this may have been a shelter home that pursuant to § 5512(a) could be used for a child taken into custody, there is no evidence it was being used for that purpose in this case. Jeremy resided there voluntarily while Connor kept unsuccessfully trying to persuade him to return home.

Plaintiffs argue that Connor should have returned Jeremy to his home against his will. They also complain that Connor acted improperly in discontinuing services after Jeremy's time at the Stone shelter came to an end without ensuring his safety. Thus, although they claim that Connor and LFC had custody as part of the argument that defendants violated the statute, the nucleus of their substantive claim is that defendants *failed* to take custody of Jeremy and perform the acts they wanted. As we discussed above, defendants had no legal right to take custody of Jeremy without the intervention of a law enforcement officer. Their failure to act as plaintiffs demand shows that Connor and LFC never had custody in the first instance.

Even if we could agree that plaintiffs showed that defendants violated the statutes, we cannot agree that this violation is negligence per se. Proof of violation of a safety statute or regulation creates a prima facie case of negligence. See *Bacon v. Lascelles,* 165 Vt. 214, 222, 678 A.2d 902, 907 (1996). The statutes or regulations that we have held have this effect have directly been concerned with the safety of persons in the position of plaintiff to avoid the kind of harm plaintiff suffered. See *id.* at 223, 678 A.2d at 907 (fire safety code); *Weeks v. Burnor,* 132 Vt. 603, 607, 326 A.2d 138, 140 (1974) (rule of the road); *Landry v. Hubert,* 101 Vt. 111, 113, 141 A. 593, 593 (1928) (same); *Wakefield v. Connecticut & Passumpsic Rivers R.R. Co.,* 37 Vt. 330, 333 (1864) (railroad safety statute); *Marzec-Gerrior v. D.C.P. Indus., Inc.,* 164 Vt. 569, 571, 674 A.2d 1248, 1249 (1996) (occupational safety regulations). *In Estate of Kelley v. Moguls, Inc.,* 160 Vt. 531, 534, 632 A.2d 360, 362 (1993), we adopted Restatement (Second) of Torts § 286 (1965), which defines the elements of a safety

statute or regulation that has this effect. The statute or regulation must be intended at least in part:

> (a) to protect a class of persons which includes the one whose interest is invaded, and
>
> (b) to protect the particular interest which is invaded, and
>
> (c) to protect that interest against the kind of harm which has resulted, and
>
> (d) to protect that interest against the particular hazard from which the harm results.

Id.; see also *id.* § 288. The primary purpose of the juvenile procedures act is to protect the welfare of children. See 32 V.S.A. § 5501(a); *In re R.B.*, 152 Vt. 415, 420, 566 A.2d 1310, 1312 (1989). Only in the broadest sense can the act be said to be a safety statute.

Again, our ability to resolve plaintiffs' argument is limited by the confused state of the pleadings and the vague statement of plaintiffs' claims. Apparently, plaintiffs' position is that if defendants had immediately taken custody of Jeremy in December of 1993 or early January of 1994 and returned him to his parents, Jeremy would have understood that he had no option but to stay with his father and follow his rules. The complaint alleges that as a result of defendants' actions Brian Dalmer "lost the love, society, affection and companionship of Jeremy for a number of years," had to "expend money on legal and expert fees and court costs" in fighting subsequent SRS interventions after the remaining runaway incidents, suffered "public scorn, ridicule, and severe emotional stress;" and incurred medical and psychiatric bills for therapy for Jeremy. Presumably, these are the items of

damage from which we can derive the interests that plaintiff, Brian Dalmer, seeks to protect. Although we have no specification of Jeremy's alleged damages, we assume they are similar.

Plaintiffs rely upon statutes that require that those taking custody of a juvenile act within a specified time limit to take the child to the court or to return the child to his or her parents. The purpose of these statutes is to ensure due process of law in the administration of the juvenile procedure act. See *In re Proceedings Concerning a Neglected Child,* 130 Vt. 525, 531-32, 296 A.2d 250, 254 (1972); *Gottlieb v. County of Orange,* 84 F.3d 511, 520 (2d Cir. 1996) (if child removed from parents' home without prior judicial authorization, parents must have an opportunity for a hearing "at a reasonably prompt time after the removal"). Although they generally protect the interests of children and their families to a neutral adjudication of whether grounds exist for state intervention, we do not believe that they are intended to protect the interests of either Brian or Jeremy Dalmer against the kind of harm they allege has resulted or against "the particular hazard from which the harm results." Restatement (Second) of Torts at § 286(d); see *Claypool v. Hibberd,* 626 N.W.2d 539, 545-46 (Neb. 2001) (statute that requires officer to notify parents on detaining a child ensures due process of law and is not intended to prevent the child from harming himself); cf. *Johnson v. State,* 165 Vt. 588, 589, 682 A.2d 961, 963 (1996) (mem.) (motel licensing law did not impose any duties with respect to the purchaser of a motel beyond those owed to the public as a whole); *Andrew v. State,* 165 Vt. 252, 258, 682 A.2d 1387, 1391 (1996) (inspection duties imposed by law on VOSHA agency are aimed at protecting the health and safety of the public as a whole and not a

particular employee who is injured); *Denis Bail Bonds, Inc. v. State,* 159 Vt. 481, 489, 622 A.2d 495, 499-500 (1993) (state agency's obligation to enforce regulatory laws over bail bondsmen does not create liability to notify bonding company of complaints; any duty agency had was for the protection of the public rather than bonding company).

Even if the sections of the juvenile procedures act were safety statutes, our law is not that violation of the statutes is negligence per se, as plaintiffs argue. See *Cooper v. Burnor,* 170 Vt. 583, 585, 750 A.2d 974, 976 (1999) (mem.) (violation of safety statute creates only a rebuttable presumption of negligence which disappears on the production of any evidence to the contrary); *id.* at 586-87, 750 A.2d at 977 (Dooley, J., dissenting and advocating change to negligence per se rule); *Marzec-Gerrior,* 164 Vt. at 576, 674 A.2d at 1252. Instead, it is that violations of safety statutes create rebuttable presumptions of negligence. As the trial judge held, the main effect of such a violation would have been in the charge to the jury, if that had occurred.

This brings us to the third step of plaintiffs' logic in this case: that as a result of the violation of the juvenile procedures act, plaintiffs introduced sufficient evidence to reach the jury on Count I of the complaint, their negligence per se count. It is here that we have the most difficulty with plaintiffs' theory of the case. Negligence is an unintentional tort based on the failure of the defendant to perform a duty with due care resulting in injury to the plaintiff. See Restatement (Second) of Torts § 282 cmt. d. (contrasting negligence with intentional torts). This case is a dispute over the right of defendants to take certain actions with respect to a runaway child, consistent with

their assumed role as an intermediary between the parents and their child. Every act of Connor about which plaintiffs complain was done intentionally and pursuant to policy of LFC. See *Hockensmith v. Brown,* 929 S.W.2d 840, 845 (Mo. Ct. App. 1996) (theories of intentional tort and negligence are mutually exclusive). Plaintiffs do not complain that defendants committed malpractice or otherwise were professionally negligent; instead they complain that defendants had no right to intervene. Nor is this a case in which it could be said that defendants were negligent with respect to the alleged harm. Connor expected that his actions would keep Jeremy separated from his parents unless a negotiated settlement was reached and that Jeremy would become aware of his legal options.

This case is vastly different from *Sabia v. State,* 164 Vt. 293, 669 A.2d 1187 (1995), the case on which plaintiffs primarily rely. In *Sabia*, we held, based on specific statutes that define the responsibilities of SRS social workers, that plaintiff children could bring a negligence action against the State based on the failure of the workers to protect them after they had knowledge of continuing sexual assaults on them by their stepfather. Unlike this case, the statutes relied upon in *Sabia* were intended to protect plaintiffs from the harm that occurred and thus gave rise to a duty of care. *Id.* at 299-300, 669 A.2d at 1191-92. Plaintiffs alleged that the workers were professionally negligent.

Whether we view this as an intentional tort action, or an action for damages caused by violation of the statute, it is not a negligence action. Plaintiffs' labels alone cannot control the substance of the case. See *Benavidez v. United States,* 177 F.3d 927, 931 (10th Cir. 1999) (allegation of negligence cannot turn an intentional tort into negligent

conduct); *United National Ins. Co. v. The Tunnel, Inc.*, 988 F.2d 351, 354 (2d Cir. 1993) (plaintiff cannot prevail by dressing up intentional tort action as a negligence action). We have recognized this principle in cases where a plaintiff labels an alleged intentional tort as negligent conduct in order to achieve insurance coverage. See *T.B.H. v. Meyer,* 168 Vt. 149, 153, 716 A.2d 31, 34 (1998) ("We must focus on the factual allegations in [the] complaint and not on the legal theories asserted. . . ."); *Nationwide Mut. Fire Ins. Co. v. Lajoie,* 163 Vt. 619, 620, 661 A.2d 85, 86 (1995) (mem.).

We have one particularly relevant precedent. In *Cronin v. State,* 148 Vt. 252, 531 A.2d 929 (1987), plaintiff state employee alleged that defendants, supervisory employees and the State, were negligent in disclosing confidential information that resulted in plaintiff's wife finding out that plaintiff was thought to be having an affair with another woman. Plaintiff grounded his negligence action on a personnel regulation that prohibited employees from disclosing certain confidential information. We did not examine whether the regulation created a rebuttable presumption of negligence, as plaintiffs argued in this case, or whether the regulation created a duty on which a negligence action could be premised. Instead, we analyzed the case as one in which plaintiff was seeking to create an implied private cause of action for violation of the statute, and finding that the Legislature intended no such private right of action, *id.* at 255, 531 A.2d at 931, we upheld dismissal of the relevant counts of the complaint. *Id.*; see also *Corbin v. Buchanan,* 163 Vt. 141, 144-47, 657 A.2d 170, 172-74 (1994) (relying on Cronin, no private right of action against town for failure to enforce provisions of building and fire protection codes).

We conclude that *Cronin* represents the proper way to analyze this complaint. As set forth in § 874A of the Restatement (Second) of Torts, creating a civil tort remedy for violation of a statute is proper only if the statute "protects a class of persons by proscribing or requiring certain conduct" and "the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision." Restatement (Second) of Torts § 874A; see also *Cronin,* 148 Vt. at 255, 531 A.2d at 931 (personnel rule creates no duty running from defendants to plaintiff and would frustrate the legislative scheme); *Carr v. Peerless Ins. Co.,* 168 Vt. 465, 473-74, 724 A.2d 454, 459 (1998); *Shields v. Gerhart,* 163 Vt. 219, 232, 658 A.2d 924, 933 (1995) (Court has been "cautious in creating a private damage remedy even where the Legislature has provided no alternative civil remedy"); *O'Brien v. Island Corp.,* 157 Vt. 135, 140 n. 3, 596 A.2d 1295, 1298 n.3 (1991) (citing § 874A, Court is hesitant to create a private remedy where "it is clear that the Legislature could have done so, knew it could do so, and did not do so").

As discussed above, we cannot conclude that the statute was intended to protect plaintiffs with respect to the harm that they allege. Moreover, we believe that civil liability would frustrate the legislative purpose, as recognized in 33 V.S.A. § 5511(3), for the State to fund intermediary programs like LINK to negotiate the reuniting of a runaway child and the child's parents. Plaintiffs' position is that such an intermediary negotiation role is never proper; the only proper action when a state official or an employee of a state funded program comes across a runaway child is for that person to take the child home, involuntarily if necessary. If the courts imposed civil

liability for the conduct intended by a program that the Legislature authorized, we would undermine the legislative authorization.

Our discussion above largely disposes of plaintiffs' second claim – that they showed enough to reach the jury on their negligence theory, irrespective of the statutory violation. Plaintiffs do suggest a somewhat different theory under this second claim, that is, that defendants negligently rendered services to Jeremy, although they return to their familiar arguments that the negligence occurred in not returning Jeremy to his parents or informing the parents of Jeremy's location and in discontinuing services without an alternative.

In any event, the superior court disposed of this claim by granting defendants judgment as a matter of law because plaintiffs failed to show that defendants' negligence was a proximate cause of the alleged harm. In reaching this conclusion, the trial court particularly relied upon the fact that Jeremy immediately ran away again when returned to his parents' home and ran away three more times thereafter.

Plaintiffs concede that they must establish proximate cause in order to recover. See *Cannata v. Wiener*, ___ Vt. ___, ___, 789 A.2d 936, 938 (2001) (mem.). They argue that the testimony of Jeremy establishes the necessary link between defendants' actions and their harm. The testimony was in response to a question whether if he had been returned home on January 5 or 6, he would have stayed home:

> If the response to my running away had been to bring me back in general, then things would have been a lot different and, no, I wouldn't have

> continued to leave. That may have happened a couple of more times, sure. But, you know, things would have changed. It would have been different.

The standard for determining whether to grant judgment as a matter of law is set out above. We conclude that under this standard the trial court properly granted judgment as a matter of law.

Irrespective of his testimony, Jeremy stated he would run away again if returned to his parents' home, and he did run away when that occurred. Moreover, he admitted in his testimony that he would have run away "a couple of more times" and that also happened. At best, plaintiffs can argue from the testimony that Jeremy would have run away fewer times if defendants had brought him home. Unlike SRS and its worker, whom plaintiffs let out of this case before the appeal, defendants had only a brief contact with Jeremy at the beginning of a lengthy process of state intervention to protect Jeremy's welfare. We believe that it is too speculative to conclude that different actions by defendants would have avoided the injuries plaintiffs allege.

We reach the same conclusion with respect to plaintiffs' claim that defendants were negligent in discontinuing services for Jeremy after the expiration of 14 days at the Stone home. While the evidence shows that defendants discontinued services, it fails to show that either Jeremy or his parents suffered any injury from the cessation of services. Jeremy was picked up almost immediately by a law enforcement officer and returned to his parents' home, exactly what plaintiffs allege was the proper course of action.

Next, plaintiffs argue that the court erred by granting summary judgment in favor of defendants on plaintiffs' claim that defendants violated their civil rights by interfering with "the training and relations between parent and child." Plaintiffs argue that Connor interfered with father's constitutionally protected custodial rights over Jeremy by taking "unlawful custody of Jeremy without [father's] consent or permission without any reason or basis to do so."

We conclude that plaintiffs waived this claim of error, at least in part. Only SRS and Jeffords moved for summary judgment in writing on this count of the complaint. Following the argument over this motion, counsel for LFC and Connor argued that any favorable ruling on the summary judgment motion should also apply to LFC and Connor. Plaintiffs' counsel agreed with this position. Based on this agreement, the trial court stated that it would issue its rulings with respect to SRS and Jeffords and follow that with the same decision for LFC and Connor, unless in the meantime, plaintiffs filed an argument why all four defendants should not be treated alike.

Plaintiffs never made an argument to differentiate between SRS and Jeffords, on the one hand, and LFC and Connor on the other. A month after the argument, the trial court granted summary judgment for SRS and Jeffords on the civil rights count, holding that SRS is not a "person" as defined in the Act and under this Court's decision in *Billado v. Appel,* 165 Vt. 482, 489, 687 A.2d 84, 89 (1996), Jeffords was entitled to qualified immunity. Thereafter, it issued a summary judgment on this count on behalf of Connor and LFC "for the reasons expressed on the record."

Plaintiffs now argue here that qualified immunity does not apply to LFC and Connor because they are not state officials. We believe this argument is foreclosed by plaintiffs' agreement at trial that all defendants should be treated the same, and their failure to make a written argument to the contrary. Furthermore, we agree with defendants that the trial judge's ruling was correct. Plaintiffs' substantive claim is indistinguishable from that made in *Billado*. We decline plaintiffs' invitation to overrule *Billado*.

Even without a waiver, we need not address the merits of plaintiffs' argument. Plaintiffs admit that a necessary element of their claim is that defendants took custody of Jeremy. As we set out above, defendants' custody of Jeremy was also an element of plaintiffs' claim that defendants violated 33 V.S.A. §§ 5511 and 5512(a), and, as a matter of law, plaintiffs failed to show such custody at trial. Thus, even if the summary judgment decision was wrong, plaintiffs' civil rights act count would also have been properly dismissed at trial. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986) (standards for summary judgment and judgment as a matter of law are essentially the same). Any error in resolving the summary judgment motion was harmless. See *Jakab v. Jakab*, 163 Vt. 575, 580, 664 A.2d 261, 263 (1995) (in the absence of prejudice to appealing party, erroneous ruling is harmless).

Finally, plaintiffs argue that the court erred in granting judgment as a matter of law on plaintiffs' claim that Connor and LFC intentionally inflicted emotional distress on them. To prove intentional infliction of emotional distress, plaintiffs must show "'outrageous conduct, done intentionally or with reckless disregard of the probability

of causing emotional distress, resulting in the suffering of extreme emotional distress, actually or proximately caused by the outrageous conduct.'" *Crump v. P & C Food Markets, Inc.,* 154 Vt. 284, 296, 576 A.2d 441, 448 (1990) (quoting *Sheltra v. Smith,* 136 Vt. 472, 476, 392 A.2d 431, 433 (1978)). As a threshold issue, the trial court must determine whether the conduct was so extreme and outrageous that a jury could reasonably find for the plaintiff. See *Denton v. Chittenden Bank,* 163 Vt. 62, 66, 655 A.2d 703, 706 (1994). The standard for establishing outrageous conduct is necessarily a high one. The conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Restatement (Second) of Torts § 46 cmt. d; see *Demag v. Am. Ins. Co.,* 146 Vt. 608, 611, 508 A.2d 697, 699 (1986) (plaintiff has "heavy burden to make out a case of outrageous conduct").

As we discussed earlier in this opinion, when reviewing a judgment granted as a matter of law, we must view the evidence in the light most favorable to the nonmoving party and exclude the effects of modifying evidence. See *Gero,* 171 Vt. at 59, 757 A.2d at 476. Much of the analysis of this claim is determined by our conclusions above, particularly our conclusion that defendants never had custody of Jeremy. We add that, in any event, the statutory violation alleged by plaintiffs does not, alone, make defendants' conduct outrageous. See *Bigby v. Big 3 Supply Co.,* 937 P.2d 794, 800 (Col. Ct. App. 1996) (violation of Colorado Anti-Discrimination Act in firing plaintiff does not make the conduct outrageous).

In arguing against the trial court action plaintiffs also recite father's testimony that after Jeremy ran away, but

before he entered the LINK program, Connor refused to tell father where Jeremy was and told father that there was no use in calling the police because Jeremy did not want to return home and Connor was taking care of Jeremy. Father urges us to conclude that this interaction and other similar interactions amount to an abuse of Connor's position sufficient to meet the high standard for outrageous conduct. Even if we accept as true father's testimony and exclude any modifying evidence, these conversations do not meet the standard for outrageous conduct. See *Denton,* 163 Vt. at 66, 655 A.2d at 706 ("We have never extended liability to 'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.' ") (quoting Restatement (Second) of Torts § 46 cmt. d). The trial court correctly granted judgment as a matter of law on plaintiffs' claim of intentional infliction of emotional distress.

Affirmed.

FOR THE COURT:

/s/ John A. Dooley, III
Associate Justice

STATE OF VERMONT
LAMOILLE COUNTY, SS

BRIAN DALMER and COLLEEN DALMER Individually and as Guardians and parents of JEREMY DALMER AND JOSHUA DALMER	)	Lamoille Superior Court Docket No. 45-2-95
Plaintiffs	)	
v.	)	
STATE OF VERMONT, DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES, GERALD JEFFORDS, LAMOILLE FAMILY CENTER, and DAVID CONNOR	)	
Defendants	)	

OPINION AND ORDER

(Filed Aug. 15, 1997)

The above-captioned matter came on before the undersigned on July 14, 1997 for a hearing on motions filed by the defendants with regard to Counts I, II and III of the plaintiffs' amended complaint. Present at the hearing was Assistant Attorney General Michael O. Duane on behalf of defendants SRS and Jerry Jeffords; Attorney Philip C. woodward was present on behalf of defendants Lamoille Family Center and David Connor; Attorney Harold B. Stevens was present on behalf of the plaintiffs, and plaintiff Jeremy Dalmer was present in the Court.

Based on the written memoranda filed by the parties with respect to the defendants' motions, and in consideration of the oral arguments by counsel, the court concludes as follows with respect to the defendants' motions:

In Count I the plaintiffs' cause of action for violation of a state statute does state a viable cause of action under Vermont law and the defendants' motion to dismiss and motion for summary judgement is DENIED.

In Count II the Department of SRS is not a "person" for purposes of 42 V.S.C. § 1983. With regard to defendant Jeffords the Vermont Supreme Court's decision in *Billado et al. v. Appel et al.* is controlling on this Court and the defendant is entitled to federal qualified immunity. In addition, any claim by the plaintiffs that their broad theories of constitutional rights to due process or religious freedom were violated would also fail under the reasoning in *Billado.* Accordingly, summary judgment as to Count II is GRANTED.

In Count III there is no basis for the plaintiffs' malicious prosecution claim as they have failed to overcome the finding of probable cause made in the underlying juvenile proceeding. Accordingly, summary judgment as to Count III is GRANTED.

SO ORDERED:

/s/ John P. Meaker
Hon. John P. Meaker
Superior Court Judge

8/15/97
(DATE)

STATE OF VERMONT LAMOILLE COUNTY, SS	LAMOILLE SUPERIOR COURT DOCKET NO: 45-2-95 LeCv

BRIAN DALMER, ET AL.,
Plaintiff,
v.
STATE OF VERMONT, ET AL.,
Defendants.

OPINION AND ORDER

(Filed Aug. 15, 1997)

The above-captioned matter came on before the undersigned on July 14, 1997 for a hearing on motions filed by the defendants with regard to Counts I, II and III of the plaintiffs' amended complaint. Present at the hearing were Assistant Attorney General Michael O. Duane on behalf of defendants SRS and Jerry Jeffords; Attorney Philip C. Woodward on behalf of defendants Lamoille Family Center and David Connor; Attorney Harold B. Stevens was present on behalf of plaintiffs. Also present was Jeremy Dalmer.

Based upon the written memoranda filed by the parties with respect to the defendants' motions, and in consideration of the oral arguments by counsel, the Court concludes and orders that defendants Lamoille Family Center and David Connor be granted judgment in their favor with respect to Count II of plaintiffs' amended

complaint, for the reasons expressed ~~in this Court's Opinion and Order dated ___, 1997.~~ on the record.

SO ORDERED:

/s/ John P. Meaker
HON. JOHN P. MEAKER
Superior Court Judge

8/15/97
(Date)

Supreme Court U.S.
FILED
DEC 12 2002
OFFICE OF THE CLERK

No. 02-706

In the

Supreme Court of the United States

BRIAN DALMER,

Petitioner,

v.

LAMOILLE FAMILY CENTER and DAVID CONNOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VERMONT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a private human services agency offering mediation and case management services to teenagers and their families is susceptible to liability under 42 U.S.C. § 1983.

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OPINIONS BELOW

The opinion of the Vermont Supreme Court is not yet officially reported, but is reprinted in the Petitioner's Appendix ("Pet.App.") at 1. The opinion of the Lamoille Superior Court is not reported; it is reprinted in Pet.App. at 27.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 2104.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983 are reprinted in Petitioner's Petition at pp. 1-2.

2. Title 33, Section 5502(a)(10) of Vermont Statutes Annotated provides:

> **Definitions and provisions of general application.**
>
> (a) As used in this chapter, unless the context otherwise requires:
>
> (10) "Legal custody" means the legal status created by order of the juvenile court under the authority of this chapter which invests in a party to a proceeding under this

> chapter or another person, which party or person may also be the guardian of the person of the minor, the right to have the physical possession of a minor and to determine where and with whom he shall live, the authority to consent to major medical, psychiatric, and surgical treatment, and the right and duty to protect, train, and discipline him and to provide him with food, shelter, education and ordinary medical care, all subject to the powers, rights, duties and responsibilities of the guardian of the person of the minor and subject to any residual parental rights and responsibilities.

3. Title 33, Section 5511 of Vermont Statutes Annotated provides:

> **Release, shelter or delivery to court.**
>
> (a) The person taking a child alleged to be a delinquent child or a child in need of care or supervision into custody shall immediately and without first taking the child elsewhere:
>
> > (1) Release the child to his or her parents, guardian or custodian; or
> > (2) Deliver the child to the juvenile court and immediately file written notice thereof with the court, together with a statement of the

reason for taking the child into custody.

(b) In the event that a law enforcement officer has reasonable grounds to believe that a child has run away from his or her parents, foster parents, guardian, legal custodian, parent lawfully exercising parent-child contact, or other person having legal or physical responsibility for the child, the law enforcement officer shall take and deliver the child to:

(1) his or her parents, foster parents, guardian, legal custodian, parent lawfully exercising parent-child contact, or person having legal or physical responsibility for the child; or
(2) any organization designated by the commissioner of social and rehabilitation services as qualified to assist children who have run away for the purpose of reuniting them with their parents, guardian or legal custodian.

4. Title 33, Section 5512(a) of Vermont Statutes Annotated provides:

Designated shelter.

(a) The commissioner of social and rehabilitation services shall designate shelters throughout the state where a child taken into custody pursuant to section

5510(4) of this title may be housed for a period not to exceed 7 days.

(b) Upon delivery of a child to a designated shelter program, the shelter program director or his or her designee, shall:

(1) notify the child's parents, guardian or custodian that the child has been taken into custody; and
(2) make reasonable efforts to mediate the differences between the parties.

(c) Upon expiration of the period referred to in subsection (a) of this section or at the request of the child or the parents:

(1) the child shall be released to his or her parents, guardian or custodian; or
(2) a law enforcement officer shall deliver the child to the juvenile court pursuant to section 5511(2) of this title.

(d) During the period of time the child is at the shelter, the legal custody of the child shall remain with the parent, unless otherwise designated by the juvenile court.

5. Title 33, Section 5510 of Vermont Statutes Annotated provides:

Taking into custody.

A child may be taken into custody:

(1) Pursuant to the laws of arrest of this state,
(2) Pursuant to an order of the juvenile court under the provisions of this chapter,
(3) By a law enforcement officer when the officer has reasonable grounds to believe that the child is in immediate danger from his or her surroundings, and that removal is necessary for the child's protection,
(4) By a law enforcement officer when the officer has reasonable grounds to believe that the child has run away from his or her parents, foster parents, guardian, legal custodian, parent lawfully exercising parent-child contact, or other person having legal or physical responsibility for the child.

STATEMENT OF THE CASE

Respondent David Connor is director of a program called the Lamoille Inter-agency Network for Kids ("LINK"), which is operated by the Respondent Lamoille Family Center (hereinafter "LFC"). LFC is a non-profit parent-child center located in Morrisville, Vermont. The LINK program was conceived from a

collaboration of human service agencies and educational agencies in the Lamoille Valley region of Vermont around 1989, in order to meet the needs of teenagers with problems at home or in school. The LINK program offers mediation and case management services to teenagers and their families. LINK also offers a shelter program for teenagers who are either thrown out of their homes or who voluntarily run away from home.

The LINK program was designed to try every reasonable avenue to resolve teenagers' family issues, keep teenagers at home, and provide services for families so children can avoid State custody. Indeed, the single most important element of the LINK program is forestalling State custody of children. The ultimate goal of the LINK program is to reunite families. Prior to the creation of the LINK program, runaways would either be on the street, or in the care of the Department of Social and Rehabilitation Services (hereinafter "SRS"). LINK was designed to provide an alternative.

LFC, among its other services, contracted with SRS–as an independent contractor–to provide counseling and mediation services, and also, if necessary, shelter to unmanageable youths and runaways. Shelter services are limited to a period of two weeks. The purpose of the shelter home is twofold. First, it provides for a cooling-off period. Second, the families are afforded an opportunity to resolve whatever difficulties they are having. Entry into a LINK shelter is voluntary, and the child always has the choice whether to enter the program. When a child is in the LINK program, the parents retain legal custody.

It is SRS policy initially to refer a runaway to LINK. Once a child is referred to LINK, SRS only

becomes re-involved if efforts by LINK are fruitless. SRS has estimated that LINK is successful in resolving family conflict nearly 96% of the time. As a result of LINK's successes, the Lamoille County district now has the lowest number of unmanageable children in custody in the State of Vermont.

In addition to referrals from SRS, LFC and LINK receive referrals directly from schools, from parents, from individual youths, from mental health programs, and other agencies dealing with children who might benefit from LINK's programs and services.

On December 26, 1993, Jeremy Dalmer–age 15 at the time–left his home in Elmore, Vermont, without his parents' permission. Jeremy had apparently clashed with his father, Petitioner Brian Dalmer, over teenage issues such as snowboarding, television, and curfews. Jeremy rode his bicycle nearly 45 miles through slush on a cold evening to stay with his friends, the Stewarts, in Plainfield, Vermont. Jeremy voluntarily and individually made the decision to go to the Stewarts' home. He received no assistance from, nor had he ever heard of, David Connor or the Lamoille Family Center at that time. Indeed, Petitioner testified that he had no evidence or personal knowledge that would indicate that David Connor or the Lamoille Family Center encouraged Jeremy Dalmer to run away from home on December 26, 1993.

On or about December 27, 1993, Mrs. Stewart called the youth services agency in a neighboring county to ask what she should do about Jeremy. They gave her the number of SRS, and told her that Jeremy should contact SRS. Mrs. Stewart was not comfortable with Jeremy staying at her house without his parents' permission. Therefore, on or about December 27, 1993,

Jeremy left the Stewarts' residence–voluntarily and without any assistance from defendants–and went to the Fisk residence in Marshfield, Vermont.

The following day, on or about December 28, 1993, Jeremy made his initial contact with SRS to notify them that he had run away from home. An SRS worker referred Jeremy Dalmer's case to David Connor, director of LINK, on December 29, 1993, three days after Jeremy ran away. Prior to the referral from SRS, neither David Connor nor LFC had any contact with Jeremy Dalmer. It was while Jeremy was at the Fisk residence that Mr. Connor first contacted him.

On December 29, 1993, David Connor informed Brian Dalmer that his son had been found. Mr. Connor did not tell Mr. Dalmer where Jeremy was staying for two reasons. First, Jeremy had requested that he not do so. Second, Mr. Connor wanted to avoid the potentially dangerous situation where parents show up and forcibly remove their child.

Mr. Connor felt it was imperative to reunite the family as quickly as possible because school was starting the following Monday. Mr. Connor obtained a history of the family problems Jeremy was having from both Jeremy and Mr. Dalmer. Although Mr. Dalmer regularly insisted that he wanted Jeremy to return home, Mr. Connor did not forcibly try to return Jeremy because Jeremy made it very clear that if he were forced to go home, he would simply run away again.

Jeremy voluntarily stayed at the Fisk residence from December 29, 1993 until January 6, 1994, and steadfastly refused to go home. David Connor drove Jeremy to and from school so that Jeremy could continue to attend People's Academy while staying at

the Fisk residence, and in the hopes of trying to break Jeremy's interest in the Marshfield area and reuniting Jeremy with his family. Jeremy testified that he was pleased Mr. Connor drove him to and from school while he was staying at the Fisks' residence. On these trips, Mr. Connor and Jeremy discussed what Jeremy needed and wanted in order to reconcile with his family. During this time, Jeremy chose to stay with the Fisks rather than return home. David Connor regularly encouraged Jeremy to return home.

On January 6, 1994, Mr. Connor explained to Jeremy that if he were unable to work things out at home, he would likely be placed in SRS custody. Mr. Connor also informed Jeremy that he would no longer be able to take Jeremy to People's Academy from the Fisks' home. Nonetheless, despite David Connor's efforts to reunite the family, Jeremy decided that he would rather enter the LINK shelter program than return home. On January 6, 1994, Jeremy, by his own choice, voluntarily entered the LINK shelter program and stayed at the Stones' residence in Morrisville, Vermont.

Jeremy was treated well while staying at the Stones' residence, and he testified to enjoying the time he spent there. Although he was staying in a shelter as part of the LINK program, Jeremy's parents maintained legal custody of him. While Jeremy was staying with the Stones, Mr. Connor encouraged Jeremy to have face-to-face contact with his parents in an effort to resolve their problems. Mr. Dalmer visited with Jeremy and had conversations with him on the phone. However, Mr. Dalmer refused to go to LFC to meet with David Connor in an attempt to mediate family problems. Mr. Dalmer testified that he had no interest in the mediation or dispute resolution services that LFC could provide. Jeremy, however, continued to refuse to go home.

Pursuant to LFC's contract with SRS, Jeremy could only stay with the Stones for a two-week period. On January 20, 1994, Mr. Connor told Jeremy that the two-week period that he could keep him in a shelter home under the LINK contract with SRS had expired. Mr. Connor told Jeremy that he could either go home; call his family to work out some agreement with them; or turn himself in to the police. Mr. Connor told Jeremy that if he did not exercise one of those three options, he would be considered a runaway and would be picked up by police. On January 20, 1994, Mr. Connor also informed the Dalmers that LFC's involvement had ended.

Jeremy continued to refuse to go home and instead went to the Misicks' residence in Marshfield. On January 21, 1994, the police picked up Jeremy at the Misicks' and returned him home to his parents. Jeremy testified that he was not happy when the police forcibly returned him to his father's home. The next day, Jeremy ran away again. He ran away from home again in May, 1994, and a fourth time on November 30, 1994. Finally, in an attempt to go to his prom, Jeremy ran away yet again on May 19, 1995.

Following each of Jeremy's run-aways, a hearing was conducted to determine who should have custody of Jeremy. At the first court hearing, on January 24, 1994, Jeremy told the court that he did not feel safe in his parents' home. Judge Cook determined that reasonable efforts were made to have Jeremy return home, but that he believed Jeremy would not stay home and, thus, placed him in temporary custody with SRS. Judge Cook concluded that the only way to keep Jeremy at home would be to chain him to a bed. Similarly, after Jeremy ran away in May, 1994, Jeremy was asked by the Judge if he would go home and stay home, and Jeremy

replied "no." Therefore, Judge Cook felt it would be irresponsible of him to return Jeremy home, so Jeremy was once again placed in SRS custody. Finally, at a juvenile disposition hearing in March, 1995, Jeremy was asked if he thought his problems with running away from home stemmed from his exposure to influences such as the defendants. Jeremy, under oath, replied "no," because:

> [N]o matter who influences me in any way, I'll be influenced that way no matter where I am, whether it's even in a newspaper article or something. And, also, they haven't influenced me. No one has ever said: Don't go home. They have just like told me the facts: That we need counseling. And no one has ever told me not to let me go home. In fact, they have all kind of encouraged it because that would be the final goal.

Similarly, at the juvenile detention hearings Mr. Dalmer testified that the fundamental reasons Jeremy ran away from home had to do with involvement with drugs, incorrigible behavior, and sexual relations with girls.

On January 9, 1996 Petitioner filed an Amended Complaint in the Lamoille Superior Court against, *inter alia*, Defendants David Connor and LFC. Mr. Dalmer maintained that respondents deprived him of his fundamental liberty interest in family integrity. On August 15, 1997, the trial court granted summary judgment to defendants on this claim. The Vermont Supreme Court affirmed on August 15, 2002.

REASONS FOR DENYING THE WRIT

There is no compelling reason for the Court to review the decision of the Vermont Supreme Court in this case. The trial court properly dismissed, and the Vermont Supreme Court properly affirmed dismissal of Brian Dalmer's civil rights claim. Neither David Connor nor the Lamoille Family Center could have violated Plaintiff's right to family integrity because (a) they never took custody of Jeremy Dalmer; (b) they are not state actors as required by 42 U.S.C. § 1983; and (c) even if there were a constitutional right of family integrity under these circumstances, the respondents would be protected from a section 1983 claim by qualified immunity.[1]

A. David Connor and LFC Never Had Custody of Jeremy

In order for Petitioner Brian Dalmer successfully to assert that his constitutional right to family integrity was violated, he must show that David Connor and LFC had custody of Jeremy. See *DeShaney v. Winnebago Cty. Dept. of Social Services*, 489 U.S. 189, 199-200, 109 S.Ct. 998, 1005 (1989), cited in *Billado v. Appel*, 165 Vt. 482, 491-92 (1996). The Vermont Supreme Court noted in this case that "[p]laintiffs [Brian and Jeremy Dalmer]

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[1] The Vermont Supreme Court affirmed on the grounds that the case was indistinguishable from the claim made in *Billado v. Appel*, 165 Vt. 482 (1996), and that no constitutional right of family integrity existed under the circumstances. Pet.App. at 21-22. The Vermont Supreme Court further determined that even if a constitutional right to family integrity were to be recognized under the circumstances, the respondents could not have violated that right as Jeremy was never in the custody of David Connor or LFC. Pet.App. at 21-22. The Vermont Supreme Court also determined that Petitioner waived the argument that Mr. Connor and LFC were state actors, as it was not raised at trial. Pet.App, at 22.

admit that a necessary element of their claim is that defendants took custody of Jeremy." Pet.App. at 22. The critical holding in this case, therefore, is the finding that "as a matter of law, plaintiffs failed to show such custody at trial." Pet.App. at 22.

The Vermont Supreme Court reviewed the relevant provisions of the Vermont Juvenile Proceedings Act, 33 V.S.A. § 5501, et seq., and affirmed that, as a matter of law, Mr. Dalmer did not prove that either David Connor or LFC ever had custody of Jeremy. Jeremy ran away from home in Decemeber, 1993 and stayed with friends for over one week before he chose to enter the LINK shelter program. He was never arrested, and there was no juvenile order issued regarding his custody at the time. Nor was he picked up by a law enforcement officer until after he had stayed in the shelter the maximum 14 days allowed by the SRS contract with LINK. Consequently, Jeremy was not in the custody of the defendants as defined in the Juvenile Proceedings Act.

B. David Connor and LFC were not "State Actors"

The Vermont Supreme Court held that petitioner waived the argument that respondents Connor and LFC were not entitled to qualified immunity on the section 1983 claims. Even if there were no waiver, however, petitioner's claim fails for the more fundamental reason that Connor and LFC were not acting "under color of state law."

To state a cause of action under 42 U.S.C. § 1983, Brian Dalmer must allege sufficient facts to establish the following two elements: (1) that the defendants were acting under color of state law, and (2) that their

conduct deprived the Plaintiff of rights secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912-13 (1981). Generally, the protections of section 1983 do not extend to private conduct violating individual rights no matter how abhorrent the conduct may be. *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191, 109 S.Ct. 454, 461-62 (1988). Accordingly, for David Connor and the Lamoille Family Center–private actors–to be subject to section 1983 liability, petitioner must establish that they were the equivalent of "state actors," and thus acting under color of state law.

A three-part test has evolved to determine whether or not a private actor is susceptible to section 1983 liability. First, the "public function" test questions whether the defendants were exercising powers traditionally and exclusively reserved for the government. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 453-54 (1974), Second, the "state compulsion" test questions whether the state is exercising such "coercive power" or "significant encouragement, either overt or covert," that the defendants' actions must be deemed to be that of the state. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 166, 98 S.Ct. 1729, 1738-39 (1978). And third, the "nexus" test, questions whether there is a sufficiently close nexus between the government and the challenged private action that it may fairly be treated as that of the government. *Jackson*, 419 U.S. at 351. David Connor and the Lamoille Family Center do not fulfill any of these criteria.

First, it cannot be said that permitting unmanageable children to stay in shelters is a power exclusively reserved for the state. Several courts have held that the care of foster children, or the placing of

displaced children in foster care, is not traditionally the exclusive prerogative of the State. *See, e.g., Murphy v. Morgan*, 855 F.Supp 943, 947 (N.D.Ill. 1994) (holding that the mere placement of displaced children in a group facility does not convert the owner of that facility into a state actor); *Lintz v. Skipski*, 807 F.Supp 1299, 1306 (W.D.Mich. 1992) ("The care of foster children is not a power which has been exclusively reserved for the state."); *Walker v. Johnson*, 891 F.Supp. 1040, 1050 (M.D.Pa. 1995) (same); *Albert v. Dane County*, 542 N.W. 777, 789 (Ct.App.Wis. 1995) (same); *Milburn v. Anne Arundel County Dep't of Social Servs.*, 871 F.2d 474, 479 (4th. Cir. 1989) (same); but see *Donlan v. Ridge*, 58 F.Supp.2d 604, 610 (E.D.Pa. 1999) (holding that *forcible removal* of child from his home by foster care agency was exclusively prerogative of the state).

The State of Vermont is not vested with exclusive responsibility for sheltering unmanageable children under the Juvenile Proceedings Act, 33 V.S.A. § 5501, *et seq.* The juvenile court may grant legal custody to SRS, but it also has the authority to grant legal custody of unmanageable children to other agencies and private actors. 33 V.S.A. § 5502(10). SRS is only one of the potential legal custodians. Thus, the State of Vermont does not have exclusive right to take custody of minors, who are determined to be unmanageable, in shelters or foster homes. Close relatives, private organizations, and other suitable individuals may serve as well. Therefore, David Connor and Lamoille Family Center were not performing traditionally exclusive state functions.

The second prong of the "state actor" test similarly doesn't apply. There is no evidence, nor does Brian Dalmer allege, that the state exercised any coercive power over David Connor and the Lamoille Family Center. The day-to-day decision-making of the

Center was left to David Connor and LFC's employees. *See Lintz*, 807 F.Supp. at 1305. Other than making initial referrals and receiving progress reports, the state has minimal interaction with the LINK program. Therefore, Defendants were not, at any time, subject to the coercive power of the state.

Finally, Brain Dalmer argues that he has presented facts demonstrating a sufficient "nexus" between the state and defendants, given the contractual undertaking by the Lamoille Family Center to run the LINK shelter program. Although the Lamoille Family Center did sign a contract with SRS, that fact alone is not sufficient to convert a private party into a state actor. *Pfoltzer v. County of Fairfax*, 775 F.Supp. 874, 891 (E.D.Va. 1991). Nor is the fact that the LINK program receives its funding from the state proof that it is a state actor. *Blum v. Yaretsky*, 457 U.S. 991, 1011, 102 S.Ct. 2777, 2789 (1982). The Lamoille Family Center is a non-profit parent-child center which entered into a contract with the state to provide placement in shelters for unmanageable children. As noted, *supra*, the placement of children in shelters is not an exclusive function of the state. Therefore, David Connor and LFC cannot be categorized as "state actors," and could not have violated any of Brian Dalmer's constitutionally-protected rights.

C. There is No Controlling Constitutional Right of Family Integrity under these Circumstances

The Vermont Supreme Court has not, as petitioner suggests, held that there is no controlling constitutional right of family integrity. The court has held that in certain circumstances, "the [claimed] right is so amorphous and conditional that no worker could

know that his or her actions were in violation of that right." *Billado v. Appel*, 165 Vt. 482 (1996). In the present case, the Vermont Supreme Court determined that "[Petitioner's] substantive claim is indistinguishable from that made in *Billado*." Petitioner apparently alleges that he was deprived of the custody of his son by defendants without his permission, but the Vermont Supreme Court found as a matter of fact and law that neither LFC nor Connor took custody of Jeremy Dalmer.

Petitioner's reliance on *Wilkinson v. Russell*, 182 F.3d 89 (2d Cir. 1999) is misplaced. *Wilkinson* acknowledged the Vermont Supreme Court's view that "although the constitution extends certain rights pertaining to the family, precedent has not delineated the exact parameters of those rights and case workers have therefore seldom had a basis for concluding that their actions were unconstitutional." *Id.* at p. 104, n.8. The Vermont Supreme Court has not refused to recognize the right to family integrity; rather, the *Billado* case held that it does not apply to circumstances similar to those in the present case.[2] The Second Circuit opinion in *Wilkinson* does not suggest a different result.

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[2] Indeed, the Vermont Supreme Court expressly recognized the constitutional right to family integrity 25 years ago. *See In re N.H.*, 135 Vt. 230, 236 (1977) ("[T]he freedom of children and parent to relate to one another in the context of the family, free of governmental interference, is a basic liberty long established in our constitutional law").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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